[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

ROSANNE WEISSMAN,

Plaintiff,

- against-

TD BANK, N.A. and 3755 EAST TREMONT AVENUE, LLC,

Defendants.

INDEX NO. 403206/10

MOTION SEQ. NO. 002

The following papers were read on this motion by plaintiff to strike defendants' answer.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

Motion sequence numbers 002 and 003 are hereby consolidated for purposes of disposition.

This is a personal injury action commenced by Rosanne Weissman (plaintiff) on February 25, 2010 to recover damages for injuries allegedly sustained on October 15, 2009 at 1:25 pm., when plaintiff slipped and fell on the lobby floor of a TD Bank (TD) located at 3755 East Tremont Avenue, New York, New York. Defendant 3755 East Tremont Avenue, LLC., (Tremont), owned the building at the time of the occurrence. Plaintiff asserts that it had been raining since 10:00 am (Plaintiff Affirmation [Aff.] in Opposition, exhibit C) and when she entered the bank and she slipped on a wet 6' foot mat that covered the large slick marble floor (Plaintiff Aff. in Opposition,¶¶ 22-27; exhibit C and E).

On October 22, 2009, plaintiff's counsel, by letter to the TD's insurance carrier, Liberty Mutual, requested the preservation of the video recording for the bank vestibule lobby for the

entire day of October 15, 2009. On November 25, 2009, TD's insurance department informed their security department to preserve the "slip and fall" accident on the video. TD's security department, thereafter only preserved the video footage of plaintiff's slip and fall on a disc, but the centralized computer surveillance system for all its branches automatically purged all the remaining days video tape data. The TD computer system automatically purges its video recordings every 120 days, unless those expressly requested be preserved.

On May 5, 2010, plaintiff was provided the accident video footage from TD, which is approximately two hours in length, and subsequently learned that only the remainder of the surveillance footage from the day of October 15, 2009 had been purged and destroyed from the system. There is no evidence that anyone saw or fully reviewed the full-day footage from the day of plaintiff's accident nor was anyone deposed on this subject.

Plaintiff now moves for an order striking TD and Tremont's (collectively, defendants) answer and suppressing their affirmative defenses by reason of engaging in the spoliation of relevant and material evidence, namely a full-day video surveillance recording of the Bank vestibule lobby area, and precluding the defendants from testifying on its behalf at the time of trial. In the alternative, plaintiff seeks an order granting her an "adverse inference" charge due to spoliation of evidence necessary to the prosecution of this action (motion sequence 002). Plaintiff asserts that the discarded video footage is relevant an necessary to establish her claim on the issue of liability in demonstrating that defendants' had actual or constructive notice of the dangerous condition. Plaintiff also proffers that the footage provided does not show the last time that TD inspected, serviced or cleaned the area. Defendants oppose the motion on the grounds that they preserved and provided what their insurance department requested, which was the slip and fall incident on the video tape. Defendants also assert that given how TD's centralized video computer system operates, the full day video was difficult and expensive to

isolate and maintain,[1] and had TD's counsel known of plaintiff's request for the full-day video records, TD would have opposed the discovery request. Moreover, defendants contend that their motion for summary judgment should be granted, which would render the loss of the full day video moot and irrelevant.

Also before the Court is a motion by defendants for summary judgment, pursuant to CPLR 3212, dismissing the complaint (motion sequence 003). Plaintiff opposes the summary judgement motion and cross-moves for and order (1) precluding the defendants from offering Peter Chen, P.E. as an expert; (2) granting a site inspection of the premises; and (3) denying defendants' motion for summary judgment. Plaintiff maintains that preclusion is appropriate here because defendants gave her late notice of their expert for the first time with their summary judgment motion and after the filing of the Note of Issue, without any explanation as to the six month delay between the site inspection and the herein motion.

STANDARD

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-

[1] According TD's attorney the cost would have been about $10,000 (see Defendants counsel's affirmation in opposition ¶ 32).

186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

It is well established that a "defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a

matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith,* 50 AD3d at 500). It is well settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material face" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Sanctions pursuant to CPLR 3126

"A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them'" (*Kirschen v Marino*, 16 AD3d 555, 555-556 [2d Dept 2005], quoting *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]), "thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice" (*Kirschen,* 16 AD3d at 556). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude that party from offering evidence as to the destroyed product" (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998] [internal citation and quotation omitted], *but see Hall v Elrac, Inc.*, 79 AD3d 427, 428 [1st Dept 2010] ["Absent proof that the destruction of the vehicle was willful, contumacious or in bad faith, the court properly declined to impose the drastic sanction of striking defendant's answer and, instead, deferred the issue of the appropriate sanction for spoliation of evidence to trial"]). "Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence" (*Kirkland*, 236 AD2d at 173).

DISCUSSION

Defendants' Motion for Summary Judgment

In support of their summary judgment motion defendants submit, *inter alia*, the deposition of TD employees and a non-party witness. In particular, defendants rely upon the deposition of the Bank floor supervisor, Erika Subria (Subria), on the issue of constructive notice and prior inspection of the vestibule area. She states in her deposition:

> Q. When was the last time you personally either inspected or observed the location of the fall prior to the accident?
>
> A. I don't recall. We periodically look at the floors to make sure if it's wet we'll take a mop and we mop up.
>
> Q. Do you know when the area where the fall happened was last cleaned prior to the accident?
> A. No I don't recall.
>
> Q. I guess does TD Bank have a contract with a janitorial service or are TD Bank employees themselves responsible for maintaining the cleanliness of the bank?
> A. We have a company that comes in to clean
>
> Q. Do you know when the cleaning occurs?
> A. When we are closed.
>
> Q. Does it happen every evening?
> A. Three times a week.
>
> Q. That company does not come in the morning prior to the bank opening they normally clean after hours?
> A. Yes
>
> Q. So, the first spot cleaning with regard to spills or minor maintenance the TD Bank employees have to clean up on their own?
> A. Correct.
>
> Q. Is there any protocol, cleaning procedure during inclement weather?
> A. Procedure?
>
> Q. Do you have a schedule you have to clean on or just as needed?
> A. No, as needed.
>
> Q. If someone was to clean up an area a TD bank employee on their own, do they make any records or notes?

A. No, there's no record or notes (*see* Aff. in Support, exhibit G, Subria tr at 37, line 19; at 39, lines 3 and 16; at 14, line 4).

The Court finds that defendants have failed to meet their prima facie case of entitlement to summary judgment as a matter of law, of demonstrating that they neither created nor had actual or constructive notice of any hazardous conditions prior to the accident (*see Deluna-Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept 2003]). Subria's testimony as to TD's maintenance procedures fails to satisfy defendants' burden that it lacked constructive notice (*see Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]). Furthermore, defendants do not provide adequate testimony regarding the last time the floor was checked prior to the accident and the actions of TD's employees on the date of the accident (*see Baptiste*, 45 AD3d at 259; *Porco v Marshalls Depart. Stores er al.*, 30 AD3d 284 [1st Dept 2006]). Defendants' reliance on Subria's deposition in support of their motion is misplaced as it does not provide "evidence regarding any particularized or specific inspection or cleaning procedure in the area of plaintiff's fall on the date in question" (*Schiano v Mijul, Inc.*, 79 AD3d 726, 727 [2d Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiff's Motion to Strike pursuant to CPLR 3126

The Supreme Court is empowered with "broad discretion in determining the appropriate sanction for spoliation of evidence" (*Utica Mut. Ins. Co. v Berkoski Oil Co.,* 58 AD3d 717, 718 [2d Dept 2009]; *Hillman v Sinha*, 77 AD3d 887, 888 [2d Dept 2010]; *Ortega v City of New York*, 9 NY3d 69, 76 [2007]). Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Samaroo v Bogopa Serv. Corp.*,106 AD3d 713, 713 [2d Dept 2013], quoting *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009]; *see Utica Mut. Ins. Co.*, 58 AD3d at 718 [When a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the

responsible party may be sanctioned by the striking of its pleading"]). The Supreme Court has broad discretion, and "may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation" (*Samaroo*, 106 AD3d at 714, quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [2d Dept 1998]).

"The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo*, 106 AD3d at 714). However, Courts must exercise prudence because "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct [and, thus, the courts] must consider the prejudice that resulted from the spoliation to determine where such drastic relief is necessary as a matter of fundamental fairness" (*Utica Mut. Ins. Co.*, 58 AD3d at 718, quoting *Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]). As such, the "party requesting sanctions for spoilation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to defend [the] action'" (*Utica Mut. Ins. Co.*, 58 AD3d at 718, quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2d Dept 2005]; *Holland*, 64 AD3d at 629 ["striking a pleading as a sanction for spoliation is appropriate only where the missing evidence deprives the moving party of the ability to establish his or her claim or defense"]). A less severe sanction may be appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her defense or case (*see Iannucci*, 8 AD3d 437 at 438).

The Court concludes that under the circumstances striking the defendants' answer is too severe a penalty. While the Court acknowledges that plaintiff properly notified TD to preserve

the full-day video surveillance recording on the date of plaintiff's accident of the vestibule area, and plaintiff was relying on the recording to investigate her claims. However, it is plaintiff's burden on this motion to demonstrate that defendants' failure to preserve the full day video fatally compromises her ability to prosecute this action. Since plaintiff has no knowledge of what was on the video recording the plaintiff cannot support her claim that without the video she cannot prove her claim (*see Utica Mut. Ins. Co.*, 58 AD3d at 718; *Lawson*, 15 AD3d at 629; *Holland*, 64 AD3d at 629). Moreover, plaintiff failed to prove that the destruction of the video was willful, contumacious or in bad faith, thus the Court will not impose the drastic sanction of striking defendants' answer (*see Hall*, 79 AD3d at 428). Accordingly, plaintiff's motion to strike the defendants' answer and affirmative defenses for spoliation must be denied.

The Court now turns to plaintiff's alternative request for an adverse inference charge due to spoliation of evidence. Although plaintiff's requested relief to strike the defendants' answer and affirmative defenses is not warranted under these circumstances, the discarded video tape recording may be relevant to issues at trial including whether the defendants had notice of a dangerous condition in the lobby. Furthermore, an adverse inference charge is appropriate here because the full-day surveillance video is not the sole means for plaintiff to establish her claim (*see Gilchrist v City of New York*, 104 AD3d 425 [1st Dept 2013]; *see also Minaya v Duane Reade Intern., Inc.*, 66 AD3d 402, 403 [1st Dept 2009] [striking of defendant's answer not appropriate yet penalty of an adverse inference imposed, where defendant failed to preserve a surveillance videotape that may have shown the stairway before and during plaintiffs fall, which may have impaired plaintiff's ability to establish notice of a defective condition on the stairs], quoting *Baldwin v Gerard Ave.*, LLC, 58 AD3d 484, 485 [1st Dept 2009]). As such, this portion of plaintiff's motion is granted.

Plaintiff's Cross-Motion

The portion of plaintiff's cross-motion for an order precluding the defendants from

offering Peter Chen, P.E. is denied is hereby denied without prejudice and is deferred to the trial judge. Although the failure of a party to exchange expert information before the note of issue and certificate of readiness is filed constitutes noncompliance under CPLR 3101(d)(1)(i), "such a failure does not divest a trial court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a motion for summary judgment" (*Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]). Additionally, it appears from submissions in the form of emails between plaintiff and defendants' counsels that plaintiff may have also served her expert disclosure after the filing of the Note of Issue and after defendants' filed their motion for summary judgment (see Defendants Reply Affirmation, exhibit E). Further, plaintiff does not discuss the amount of time that has passed since a demand for expert disclosure was made upon the defendants, if one was made at all. Moreover, at this late juncture plaintiff is not entitled to a site inspection of the premises, as the Note of Issue was filed in this matter on October 5, 2012 and plaintiff has not demonstrated any unanticipated or unusual circumstances.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the portion of plaintiff's motion seeking to strike defendants answer and suppressing defendants' affirmative defenses, pursuant to CPLR 3126 (motion sequence 002) is denied; it is further,

ORDERED that the portion of plaintiff's motion, pursuant to CPLR 3126, seeking an adverse inference charge due to TD's failure to preserve the full-day surveillance footage of the lobby on the date of plaintiff's accident is granted, and an adverse inference charge shall be given at trial relative to the missing portions of the surveillance footage provided by defendant TD (motion sequence 002); and it is further,

ORDERED that defendants' motion seeking summary judgment and dismissal of the

complaint (motion sequence 003) is denied; and it is further,

ORDERED that the portion of plaintiff's cross-motion for an order precluding defense from offering Peter Chen, P.E. as an expert (motion sequence 003) is denied without prejudice; and it is further,

ORDERED that the portion of plaintiff's cross-motion for a site inspection of the premises (motion sequence 003) is denied; and it is further,

ORDERED that counsel for defendant TD Bank is directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

This constitutes the decision and order of the Court.

Dated: 12/18/13 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ☐ **FINAL DISPOSITION** ▩ **NON-FINAL DISPOSITION**
Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**